UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-35569, 05-35570 & 05-35646

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiff-Appellees,

and

STATE OF OREGON,

Plaintiff-Intervenor-Appellee,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendant-Appellants,

and

BPA CUSTOMER GROUP, et al., and STATE OF IDAHO,

Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
NO. CV-01-00640-RE

PLAINTIFF-APPELLEES' BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT
REQUIRED BY FRAP 26.1

Plaintiff-appellees National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Trout Unlimited, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Idaho Rivers United, Idaho Steelhead and Salmon United, Northwest Sportfishing Industry Association, Salmon for All, Columbia Riverkeeper, American Rivers, Federation of Fly Fishers, and NW Energy Coalition, have no parent companies, subsidiaries or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 30th day of June, 2005.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of this case pursuant to 28 U.S.C. §1331. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUE

Whether the district court abused its discretion in issuing a narrowly-tailored injunction to protect threatened Snake River fall chinook while federal appellants take steps to comply with the Endangered Species Act ("ESA"), 16 U.S.C. §1536(a)(2).

INTRODUCTION

Appellants, U.S. Army Corps of Engineers ("Corps"), Bureau of Reclamation ("BOR"), National Marine Fisheries Service ("NMFS"), BPA Customer Group, and State of Idaho have appealed the district court's June 10, 2005 order granting plaintiffs, National Wildlife Federation, et al. ("NWF"), a limited injunction to protect juvenile Snake River fall chinook migrating down the Snake and Columbia rivers this summer from harmful effects caused by operation of federal dams and reservoirs. Appellants portray this injunction as a head-long, unprecedented, and reckless experiment in river management by the district court that poses needless risk to juvenile fall chinook and imposes needless cost on the Bonneville Power Administration ("BPA").

The lower court's injunction is not, however, an experiment in judicial activism but a tailored ruling, well-grounded in the evidence and in the case law.

Moreover, the district court has handled this case for several years and is intimately familiar with the evidence and federal appellants' failed efforts to protect listed salmon and steelhead. As explained below, the district court carefully considered the facts and the law and enjoined appellants to allow additional water releases, called "spill," at four dams only after finding that "irreparable injury will result if changes are not made," Fed. ER 567 (Injunction Order),[1] and concluding that the injunction was "necessary to avoid irreparable harm to juvenile fall chinook." Id. at 569.

This Court should affirm the district court's injunction because the lower court did not abuse its discretion and properly dispensed with each of the arguments appellants advance in these consolidated appeals.

BACKGROUND

I. SPILL IS A BEDROCK SALMON PROTECTION MEASURE

For all juvenile salmon and steelhead migrating in the Snake and Columbia rivers, spill indisputably provides the safest way to pass the eight Federal Columbia River Power System ("FCRPS") dams. ER:704 at 249 (the "2000 BiOp") ("relative to other passage routes ... direct juvenile survival is highest through spillbays"). Spilling water at these dams allows salmon to avoid the

[1] Federal appellants' Excerpts of Record are cited as "Fed. ER," followed by the internal Bates-stamp page number. NWF's Excerpts are cited as "ER:x," to indicate the ER tab, followed by the internal Bates-stamp page number.

power turbines that kill and injure many fish. Id. at 260. Spill also allows juveniles to avoid the fish bypass and collection systems at the four dams at issue in these appeals. Survival of juveniles through these complex bypass/collection facilities is lower than for fish that pass the dams by spill. ER:731 at 357("passage survival for juvenile salmonids at Columbia and Snake River dams is generally highest for spillways, followed by bypass systems, and then turbines").[2] Because spill has proven so effective, past NMFS biological opinions for FCRPS operations have prescribed broadly that "measures [to] increase juvenile fish passage over FCRPS spillways are the highest priority" for passage improvements. ER:704 at 259 (emphasis added).

In light of the strong evidence that spill improves juvenile salmon survival, a core element of the Reasonable and Prudent Alternative ("RPA") in the 2000 BiOp (the predecessor to the biological opinion at issue here) was the "summer spill" program that required the Corps to spill water at one dam on the Snake River and at three dams on the Columbia River. Fed. ER 567-568 (Injunction Order); ER:704 at 265-269. NMFS calculated that even this limited summer spill would

[2] The bypass facilities consist of a complex array of screens, chutes, and pipes at three of the Snake River dams and at McNary dam on the Columbia. These facilities serve two functions: (1) when there is no spill, they allow juvenile fish to get past the dams without going through the turbines; and, (2) they allow the federal agencies to capture and transport juvenile fish down river in trucks and barges, a controversial technique that NMFS scientists have concluded after more than 20 years "appear[s] to neither greatly harm nor help the fish," ER:910 at 614.

provide a substantial portion of the survival improvement required to avoid jeopardy to threatened Snake River fall chinook. ER:704 at 253-255.

Additional summer spill easily can be implemented at the four dams at issue here and is being implemented now under the district court's injunction. Apart from the increased juvenile salmon survival provided by this spill, the consequences of additional summer spill are two-fold: (1) the combination of spill and collection of fish in the bypass facilities at these four dams leads to what salmon managers have termed a "spread-the-risk" migration where juvenile salmon both migrate in the river and are collected and transported in trucks and barges; and, (2) the additional spill reduces to some extent the amount of hydroelectric power generated at each of the affected dams because water that flows over the dam spillbays cannot be routed through the turbines to produce electricity.

Because the survival benefits of spill are so significant and so well-established, federal, state, and tribal fishery scientists have long urged the Corps and NMFS to provide additional spill during the summer at the four dams affected by the district court injunction to provide for spread-the-risk migration conditions. See ER:732 at 468 (State of Oregon biologists concluding that "[t]he benefits of summer spill for increasing survival of Snake River fall Chinook have been thoroughly documented.... [t]his operation will improve survival of Snake River fall Chinook" (citations omitted)); ER:732 at 497 (Washington State Department

of Fish and Wildlife recommendation that "no more than half the juvenile population be transported"); ER:731 at 414, 421(Idaho comments that "NOAAF strategy of continuing to rely only on transportation just delays attention to other strategies that may improve survival"); ER:722 at 348 (Joint Technical Staff [U.S. Fish and Wildlife Service, Washington, Oregon, and Idaho fish and wildlife departments, Nez Perce Tribe, Shoshone-Bannock Tribe, and Columbia River Inter-tribal Fish Commision] comments noting NMFS' finding that "in four out of six years, the combined bypass group [of juvenile fall chinook salmon] exceeded the smolt-to-adult-return rate of the combined transported group" and urging the agencies "on the basis of the available scientific information to reconsider the present policy of maximizing transportation of fall chinook juveniles" in favor of a spread-the-risk strategy involving increased summer spill).

Analyses by NMFS also support additional summer spill as required by the district court to reduce the harm to migrating juvenile fall chinook. See ER:731 at 384-385 (NMFS scientists concluding that spill results in high survival past dams, reduced exposure to predators, and that "lack of spill was at least partially responsible" for low salmon survival in the summer of 2001); ER:550 at 44 & n.1 (NMFS analysis concluding that "transportation appears neither to greatly harm nor help the fish, and thus a combination of transportation and providing good passage conditions for fish not collected is consistent with a 'spread-the-risk'

strategy until more is known."); see also ER:569 at 89 (independent scientific analysis concluding that "there is a large benefit of ceasing all transportation and increasing spill in the summer time").

NWF and other parties also provided the district court with extensive expert testimony that increased spill this summer "will reduce the harm to migrating juvenile salmon and steelhead as compared to what they would otherwise experience under the 2004 BiOp." ER:836 at 535-36 (Pettit Declaration at ¶49); see also id. at 525-29, 530-31, 534-36; ER:970 at 638-48 (Second Pettit Declaration); ER:893 at 552-58, 565-68, 570-73 (Olney Declaration ¶26 concluding that "adopting a spread-the-risk approach would increase survival because of the additional survival benefits from spill. Continuing the current program will result in harm to Snake River fall Chinook in 2005 and beyond."); ER:975 at 721-28 (Second Olney Declaration); ER:972 at 663-668 (Lorz Declaration) (explaining in ¶10 that "Plaintiffs' proposal nearly doubles the system survival estimated for the BiOp summer operations.")[3]

[3] NWF also submitted evidence with its opposition to appellants' emergency motions for a stay pending appeal to demonstrate that allowing additional summer spill under the district court injunction would improve juvenile salmon survival and to rebut a number of appellants' belated claims to the contrary. See Lorz Declaration (filed in these appeals June 16, 2005) ¶¶8-13 (explaining that increased spill as ordered by the district court will increase juvenile salmon survival this summer); id. ¶¶5-12 (explaining flaws in the Second Declaration of Christopher L. Toole, Fed. ER 395-400, that suggests a contrary result).

II. PRIOR BIOLOGICAL OPINIONS FOR FCRPS OPERATIONS

The district court injunction to allow additional spill at four Snake and Columbia river dams this summer, and the evidence that supports it, do not reflect a reckless and dangerous management experiment. Nonetheless, requests for such measures from federal, state, and tribal fish managers over the years have fallen on deaf ears because they would require changes in business-as-usual river operations. This fundamental conflict between salmon protection and maintaining existing economic river uses is reflected in the history of litigation over prior biological opinions for FCRPS operations.

More than a decade ago in Idaho Dept. of Fish and Game v. NMFS, 850 F. Supp. 886 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995), the district court rejected as arbitrary and contrary to law an early biological opinion which found that FCRPS operations would not jeopardize ESA-listed salmon. The court concluded that NMFS had improperly "discounted low range assumptions without well-reasoned analysis and without considering the full range of risk ..." in order to present a misleadingly rosy picture of the effects of FCRPS operations on ESA-listed salmon. Id. at 898, 892-901. In reaching this conclusion, the court also observed that the biological opinion was

> seriously, "significantly," flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation–that is, relatively small steps, minor improvements and adjustments–when the situation literally cries out

> for a major overhaul. Instead of looking for what *can* be done to protect the species from jeopardy, NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption.

Id. at 900 (emphasis in original). The court noted that "the underlying root of the litigation problem is the feeling [of the other federal, state, and tribal fishery scientists] that the federal government is simply not listening to them." Id. These problems have not dissipated over the years. See Fed. ER 327-330 (Summary Judgment Order); see also Northwest Environmental Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1395 (9th Cir. 1994) (finding that the "Council's approach seems largely to have been from the premise that only small steps are possible, in light of entrenched river user claims of economic hardship ... sacrificing the Act's fish and wildlife goals for what is, in essence, the lowest common denominator acceptable to power interests.").

In the next biological opinion for FCRPS operations, issued in 1995, NMFS concluded that operation of the federal dams and reservoirs would jeopardize the continued existence of listed salmon and steelhead, including Snake River fall chinook. See NWF v. NMFS, 254 F. Supp.2d 1196, 1201 (D. Or. 2003). The term of this opinion, however, was limited to allow the agencies to identify and evaluate a set of long-term dam operations that would avoid jeopardy and adverse modification of critical habitat by providing the "major overhaul" of the system identified by the district court in IDFG v. NMFS as necessary to meet the needs of

the species. ER:704 at 247.

In December 2000, NMFS issued a new biological opinion for dam operations. The 2000 BiOp first concluded that continued FCRPS operations under the RPA from the 1995 opinion would, themselves, jeopardize the species and adversely modify their critical habitat. Compare ER:704 at 248 (describing proposed action as "continue[d] current FCRPS operations that implement the 1995 RPA") with id. at 257 (conclusion that proposed action "will jeopardize the continued existence of [Snake River fall chinook] and [] adversely modify its critical habitat"). In the 2000 BiOp the agency therefore developed a new RPA and assessed whether slightly modified dam operations under that RPA, when combined with the environmental baseline and cumulative effects, would avoid jeopardy. Because NMFS concluded that the RPA for dam operations would not by itself provide adequate prospects of survival and recovery to avoid jeopardy, see id. at 270 (predicting that RPA alone would not meet jeopardy standard for Snake River fall chinook), it assessed qualitatively whether a complex collection of "off-site" mitigation activities unrelated to dam operations, some of which were part of the RPA and some of which were not, could avoid jeopardy, id. at 271 (concluding RPA measures "combined with the activities expected of other Federal and non-federal entities will achieve necessary survival improvements").

The district court found the agency's consideration of these unrelated and

uncertain off-site measures at odds with the requirements of the ESA and its implementing regulations. NWF v. NMFS, 254 F. Supp.2d at 1211-12. The court, therefore, remanded the opinion to NMFS to determine whether dam operations and mitigation measures that complied with the regulations and were reasonably certain to occur, when considered together with the environmental baseline and cumulative effects, would avoid jeopardy. See ER: 439 at 2 (Remand Order).

Despite this specific remand, the federal appellants chose to prepare an entirely new and markedly different biological opinion for FCRPS operations on remand. Rather than follow the carefully prescribed steps for a jeopardy analysis set forth in the ESA regulations, 50 C.F.R. §402.14, acknowledge the grave risks to ESA-listed salmon and steelhead in the Columbia basin from FCRPS operations, and identify specific dam operations and actions to avoid jeopardy, the new opinion truncated consideration of the substantial risks these species face and attempted to create the appearance that the federal action agencies are not accountable for most of the harm on-going FCRPS operations cause. As a consequence of these major changes in legal interpretation–not actions–NMFS concluded in the 2004 BiOp, for the first time since 1995, that on-going operation of the FCRPS dams and reservoirs would ***not*** jeopardize any Columbia basin salmon and steelhead or adversely modify their critical habitat. It is this opinion (the 2004 BiOp) that the district court addressed and found invalid in its May 26,

2005, summary judgment ruling. Fed. ER 325-381.

While the rationale NMFS offers in the 2004 BiOp for its marked legal and scientific departures from the jeopardy analysis required in the regulations and applied in past biological opinions is convoluted, the result of this shift–and the real reason for it–is unmistakable. In 2000, applying the same regulations to a nearly identical set of FCRPS operations, NMFS determined that without an extraordinary level of mitigation from other actions and actors in the Columbia/Snake river basin, on-going FCRPS operations would jeopardize eight ESA-listed salmon and steelhead populations. See, e.g., ER:704 at 271; see also NWF v. NMFS, 254 F. Supp.2d at 1214-15. In the intervening four years, the impacts of these on-going operations on the species have not changed, nor has there been any dramatic shift in the species' status.[4] Rather than acknowledge these facts and address the specific problems in the 2000 BiOp that the district court found in NWF v. NMFS, federal appellants produced an entirely new opinion in 2004 in order to reach an otherwise unattainable "no jeopardy" finding. In so doing, NMFS either condemned the listed salmon and steelhead to extinction or

[4] The district court reviewed the evidence in the record and found that NMFS' optimistic characterizations of the status of many species were based on a "selective reliance on data" from a "non-peer reviewed study." Fed. ER 351 & n.12; id. at 369-77 (Summary Judgment Order); see also, e.g., Fed. ER 696 (NMFS finding that "the biological requirements of [Snake River spring/summer chinook] juveniles have not been fully met within the range of recent runoff conditions and would not be fully met under the reference operation").

pushed much of the burden of ensuring their survival and recovery onto others–the states, tribes, and private parties.[5]

III. PROCEDURAL BACKGROUND

This is the second time in as many years that the government has come to this Court to overturn a district court decision involving spill of water at Snake and Columbia river dams to avoid harm to ESA-listed Snake River fall chinook. In the summer of 2004, the district court enjoined federal appellants from curtailing summer spill operations at four dams where spill already occurs. ER:602 at 136-39 (2004 Injunction Order). Then as now, the chief argument for limiting summer spill was that it was costly and, according to federal appellants, provided little benefit to migrating juvenile salmon. Id. This Court denied the federal agencies' emergency request to stay the 2004 injunction, and federal appellants subsequently dismissed their appeal.

In November 2004, NMFS issued a new biological opinion (discussed above) purportedly to address the district court's ruling in NWF v. NMFS, 254 F. Supp.2d at 1211-12. NWF immediately sought review of the new opinion, and on May 26, 2005, the district court granted NWF's motion for summary judgment on

[5] For example, because the health of Snake River fall chinook affects salmon fisheries as far north as Alaska, reductions in fall chinook numbers caused by FCRPS operations have the effect of reducing harvest by Alaskan fishermen. See ER:515 at 7, 14-15.

its claims that the 2004 BiOp failed to comply with the ESA. See Fed. ER 338-58 (identifying four fundamental flaws in the 2004 BiOp). On June 10, 2005, the district court heard argument on NWF's injunction motion to reduce the harm juvenile fall chinook would otherwise face this summer. NWF filed this motion on March 21, 2005, before the district court's summary judgment decision, and it was fully briefed by all parties over the next two months. In its motion, NWF requested that the court: (1) enjoin the Corps to allow additional spill at four Snake and Columbia river dams; (2) enjoin the Corps and BOR to improve water velocity in the rivers by providing additional flows and/or lowering reservoir levels; and (3) enjoin the agencies to otherwise implement the RPA from the 2000 BiOp.

After careful consideration of these requests, the district court declined to alter river flows, finding that this change in operations "requires further study and consultation." Fed. ER 569 (Injunction Order). The court also left the 2004 BiOp in place pending a hearing in September on an appropriate remand order. Id. at 564-65. The court did, however, enjoin the Corps to allow additional spill at four dams this summer to improve dam passage and river conditions for juvenile fall chinook, reducing the harm these fish would otherwise face. Id. at 567-70.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction "for abuse of discretion," Rodde v. Bonta, 357 F.3d 988, 994 (9th Cir. 2004), a "'limited and

deferential'" inquiry, id. at 995. A district court abuses its discretion only where "it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." Id. (quotation omitted). "'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week old, unrefrigerated dead fish.'" Fischer v. Roe, 263 F.3d 906, 912 (9th Cir. 2001) (quoting Parts & Electric Motors, Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)). In determining whether the lower court based its decision on an erroneous legal standard, the Court reviews any issue of law *de novo*, Rodde, 357 F.3d at 995, and also looks to whether the court properly applied the "arbitrary and capricious" standard of review under the Administrative Procedure Act ("APA"), 5 U.S.C. §706.[6]

It is well-established that this Court "'may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt.'" Price v. City of Stockton, 390 F.3d 1105, 1109 (9th Cir. 2004) (quoting Atel Fin. Corp. v. Quaker Coal Co., 321 F.3d 924, 926 (9th Cir. 2003)).

In this case, the standard that governs issuance of an injunction is derived

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[6] Under this standard, the core inquiry before the district court is whether the agencies correctly applied the law and "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Pacific Coast Fed'n of Fishermen's Ass'ns v. NMFS, 265 F.3d 1028, 1034 (9th Cir. 2001) (quotation omitted).

from the ESA. TVA v. Hill, 437 U.S. 153, 173, 193-95 (1978). In the ESA, Congress "foreclosed the exercise of the usual discretion possessed by a court of equity." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Accordingly, once plaintiffs have shown a likelihood of success on the merits, the balance of hardships and the public interest require an injunction. TVA, 437 U.S. at 194; Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1057 (9th Cir. 2002) ("Congress in passing the ESA removed the traditional discretion of courts in balancing the equities before awarding injunctive relief"). While a district court need not reflexively issue whatever injunction a plaintiff requests, upon finding a violation of the Act, as the decisions of this Court make clear, the court considers and weighs the evidence not to determine whether the balance of equities favors an injunction in the first instance (Congress already has made that determination, TVA, 437 U.S. at 194) but to determine the form such relief should take, if any, to address the risks to the species from the proposed action. See Washington Toxics Coalition v. EPA, No. 04-35138, slip op. at 7735, 7741-743 (9th Cir. June 29, 2005) (discussing district court's consideration of "the appropriate scope of injunctive relief" and upholding injunction to protect salmon).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by enjoining the Corps to allow additional spill at four dams this summer to protect migrating salmon. After ruling

on summary judgment that the 2004 BiOp was arbitrary and contrary to law, the court properly granted NWF a limited injunction. The court's narrowly-tailored remedy is well-supported by evidence showing that on-going FCRPS operations under the 2004 BiOp will harm juvenile Snake River fall chinook and that providing better in-river migration conditions through increased spill will help alleviate that harm.

ARGUMENT

I. APPELLANTS ARE NOT LIKELY TO PREVAIL ON THE MERITS OF THEIR APPEAL

Appellants argue that the district court erred in finding the Corps had violated ESA §7 and in ruling the 2004 BiOp arbitrary, capricious and contrary to law. Appellants made each of these arguments below and each was carefully considered and correctly rejected by the district court.

A. The Corps Violated §7 of the ESA.

ESA §7 includes both procedural and substantive duties. Agencies have a substantive duty to *ensure* that their actions are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. §1536(a)(2); Conner v. Burford, 848 F.2d 1441, 1452 & n.26 (9th Cir. 1988). In order to meet this strict substantive duty, Congress imposed on federal agencies a *procedural* "consultation" duty whenever a federal action may affect a listed species. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (holding that ESA's procedural

requirement was designed "to ensure compliance with the [ESA's] substantive provisions."). As the Court explained in Thomas "[i]f a project is allowed to proceed without substantial compliance with [the ESA's] procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." Id. (citations omitted).

The lower court's ruling that the Corps has violated §7 of the ESA is undisputable and grounded in this long-standing precedent. See Fed. ER 565-566 (Injunction Order). Once the court concluded that the 2004 BiOp was illegal, the Corps could not claim it had completed successfully the procedural steps in the consultation process. Thomas, 753 F.2d at 764; see also Washington Toxics Coalition v. EPA, No. 04-35138, slip op. at 7741-7744. This fundamental procedural defect in the Corps' ESA compliance is dispositive of NWF's §7 claim against the Corps.

Appellants may seek to narrow Thomas and its progeny to require only that federal agencies engage in the consultation process, regardless of whether the biological opinion that results from that process complies with the law. This extraordinary view conflicts directly with Thomas and would eviscerate the substantive protection of listed species Congress intended the consultation process to ensure. Appellants' attempted re-interpretation of Thomas would allow federal agencies to avoid ever facing an injunction for their failure to receive a valid

biological opinion so long as they received some document labeled "biological opinion." Section 7 consultation is not such a meaningless paper exercise; it requires successful compliance with a series of procedures that, in turn, provide substantive protection for species threatened with extinction.[7]

Because the district court concluded that the 2004 BiOp is invalid, the Corps has not completed the procedural steps required by §7 to ensure that on-going FCRPS operations will not cause jeopardy to ESA-listed salmon and steelhead or adversely modify their critical habitat. This conclusion alone is enough to justify an injunction but the district court also specifically determined that the Corps had not articulated any *independent* basis for concluding its actions would avoid jeopardy. See Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 989 F.2d 1410, 1415 (9th Cir. 1990) ("the Navy may not rely solely on a FWS biological opinion to

[7] It is telling that appellants' theory of what Thomas requires conflicts directly with a number of decisions where courts have issued injunctions against an action agency, like the Corps, after finding that a completed biological opinion was invalid. See, e.g., Conner, 848 F. 2d at 1458 (invalidating biological opinions covering oil and gas leasing activities and enjoining action agency from any further surface-disturbing lease activities until adequate biological opinions were prepared); Sierra Club v. Marsh, 816 F.2d 1376, 1386-1389 (9th Cir. 1987) (enjoining the Corps from completing work on a flood control project until it reinitiated consultation); Greenpeace Foundation v. Mineta, 122 F. Supp.2d 1123, 1139 (D. Haw. 2000) (enjoining ongoing fishing activities after invalidating biological opinion); Greenpeace v. National Marine Fisheries Serv., 106 F. Supp.2d 1066, 1080 (W.D. Wash. 2000) (discussing Thomas extensively and enjoining portions of fishery managed by NMFS after finding biological opinion invalid).

establish conclusively its compliance with its substantive obligations under section 7(a)(2)"); Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993)(same).

In a well-reasoned discussion, the court explained that the Corps had violated the ESA by relying solely on the 2004 BiOp to satisfy its independent duty to avoid jeopardy. See Fed. ER 565-566; see also ER:910 at 592-606; ER:883 (Administrative Record documents showing that the action agencies were extensively involved in the development of the 2004 BiOp). Where, as here, there has been no independent analysis, the no-jeopardy conclusion in the Corps' ROD is unavoidably anchored to the fate of the 2004 BiOp. Resources Ltd., 35 F.3d at 1304-05; see also Center for Biological Diversity v. Rumsfeld, 198 F. Supp.2d 1139, 1157 (D. Ariz. 2002) ("the Army knew of the need to take immediate and drastic measures to maintain flows.... [but] sought to rely on the FWS's arbitrary and capricious determination that its action was not likely to cause jeopardy"). The district court correctly concluded the Corps had violated ESA §7 because "in substance the RODs relied on the no-jeopardy finding of the 2004BiOp without an independent rational basis for doing so." Fed. ER 565.

B. NMFS' 2004 BiOp Is Arbitrary, Capricious, and Contrary to Law.

Federal appellants also argue that the district court's May 26, 2005, summary judgment ruling is erroneous.[8] The district court concluded that the 2004

[8] It is important to note, as appellees, BPA Customer Group, have, that the district

BiOp was flawed in four key respects: (1) it failed to consider the effects from on-going FCRPS operations that NMFS deemed "nondiscretionary," Fed. ER 339-347; (2) it improperly compared the small amount of effects it attributed to discretionary operations to a hypothetical reference operation, instead of considering these effects in conjunction with the effects of environmental baseline conditions, cumulative effects and status of the species in order to make a jeopardy determination, id. at 342-352; (3) it failed to evaluate the impact of on-going FCRPS operations on the designated critical habitat needed for recovery of the species, id. at 352-357; and (4) it failed to address whether the action would jeopardize ESA-listed salmon because of its effects on their prospects of recovery. Because the district court correctly applied the law, Rodde, 357 F.3d at 995, to each of these "independently dispositive" legal issues, Fed. ER 338, appellants cannot show they are likely to succeed on *any* of their claims, let alone on all four.[9]

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court's summary judgment ruling is not itself properly before the Court in this injunction appeal. The district court made clear that this ruling is not yet final and appealable. Fed. ER 367-68. The summary judgment decision is relevant, if at all, only to this Court's determination of the likelihood of appellants success on the merits of their appeals of the district court's injunction order. Despite this limited relevance, NWF explains in the following sections that the district court correctly applied the law to the facts in its summary judgment order.

[9] Because it is mentioned most often in the court's injunction ruling, appellants may attempt to narrow the entire basis for the injunction to the issue of whether NMFS improperly limited the scope of its jeopardy analysis to only the purportedly "discretionary" operation of the hydrosystem. Of course, whatever flaw in the 2004 BiOp the district court mentioned most frequently in its injunction

1. The jeopardy analysis in the 2004 BiOp is improperly limited.

The jeopardy determination in the 2004 BiOp is based on an unprecedented "framework" that ignores the ESA and its implementing regulations and results in only a relative judgment about whether the action (as improperly limited, see infra at 27-34), when compared to a hypothetical "reference operation," will be better or worse for fish than the reference operation. As the district court correctly determined, the ESA, the plain language of the regulations, and consistent agency practice require a broad and comprehensive evaluation of whether an agency action will cause jeopardy in the context in which it actually will occur, not in isolation or compared to the effects of some hypothetical construct. Fed. ER 347-352.

The ESA's implementing regulations detail a set of comprehensive factors and sequential steps that NMFS must consider and complete in order to determine whether an action will jeopardize a listed species. 50 C.F.R. §§ 402.14(g)(2)-(4), 402.02. The regulatory definitions further define the effects that must be addressed in this analysis. Id. §402.02. Specifically, the "effects of the action" that the agency must evaluate include the "direct and indirect effects of an action ... together with effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." Id. The

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order, this Court can affirm the lower court's grant of an injunction on any basis fairly presented in the court's decision and the record. City of Stockton, 390 F.3d at 1109.

"environmental baseline," in turn, includes "all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone" their own consultation and any "contemporaneous" state or private actions. Id. Finally, the regulations define "cumulative effects" to include any "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area." Id. The regulations thus prescribe a comprehensive assessment that builds a complete and realistic picture of the effects of existing actions and circumstances on the species and then adds the effects of the proposed action to this picture in order to determine whether the combination will cause the *action* to jeopardize the species.

NMFS' Consultation Handbook confirms this carefully structured and comprehensive approach. The Handbook states that when "determining whether an action is likely to jeopardize the continued existence of a species" NMFS must decide

> whether the *aggregate* effects of the factors analyzed under 'environmental baseline,' 'effects of the action,' and 'cumulative effects' in the action area–when viewed against the status of the species or critical habitat as listed or designated–are **likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat.**

ER:713 at 317 (italics added, bold in original).

Appellants ignore these detailed steps for assessing jeopardy and instead

argue the ESA allows NMFS to make a jeopardy determination for an action in isolation from any other circumstances or considerations. NMFS attempts to justify this unprecedented approach by re-interpreting the regulatory definition of "jeopardize the continued existence of." 50 C.F.R. §402.02. That regulation defines this phrase as "engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Id. In the 2004 BiOp for the first time, NMFS identified in this definition two distinct, sequential inquiries. In step one, NMFS asserts that it must determine whether the effects of the proposed action, standing alone, will "reduce[] reproduction, numbers, or distribution of a species." To accomplish this, NMFS states that it must evaluate the effects of the action "compared to the environmental baseline." Fed. ER 605; see also id. at 747. NMFS then asserts that if this comparison shows that the action will have "no net effect" on a species, the jeopardy inquiry is at an end and the agency need not consider further environmental baseline conditions, cumulative effects, or the current status of the species. Fed. ER 605; id. at 903; see also Fed. ER 349 (Summary Judgment Order) (finding that comparison was intended to yield "an estimate of the incremental impact ... of the proposed action standing alone").

Only if NMFS finds a net effect from the proposed action considered in

isolation will it consider the second question – whether that net reduction has an "appreciable" effect on the species' prospects of survival and recovery. Fed. ER:605. According to NMFS, only at this second stage must it acknowledge and consider the proposed action together with the current status of the species, the effects of the environmental baseline, and any cumulative effects, id. at 605, 904-905, in short the components of a jeopardy analysis required by the ESA regulations. See 50 C.F.R. §402.14(g). Based on comparison of the alleged net effects of the proposed action to the effects of the hypothetical "reference operation," however, NMFS determined in the 2004 BiOp that the action would have no net effects and hence could not jeopardize any ESA-listed salmon or steelhead. Compare, e.g., Fed. ER 814 (assessing net effects of proposed action and predicting "no net change" for Snake River spring/summer chinook) with id. at 909 (making jeopardy determination based on "no change" finding).

Regardless of whether the "action" and this "reference operation" were correctly defined – and the district properly concluded they were not, see infra at 27-34; Fed. ER 339-347–NMFS' comparative approach erroneously removes consideration of the environmental baseline and cumulative effects from its jeopardy determination. The district court, therefore, correctly concluded that NMFS' interpretation of the regulations was not reasonable and deserved no deference. See Fed. ER 347-352; Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir.

1998) (agency's interpretation of a regulation "cannot be upheld if it is plainly erroneous or inconsistent with the regulation").[10]

Contrary to appellants' characterization of this holding, NWF does not argue, nor did the district court find, that §7 requires NMFS to conduct an independent, full-blown consultation to determine if the total effects of an aggregation of all past actions in the action area will cause jeopardy *before* it may analyze whether the proposed action will jeopardize the species. The ongoing effects of these past actions, however, are part of the environmental baseline that

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[10] Appellants have suggested that under the district court decision, the entirely separate process of "informal consultation" would become impossible or meaningless because the agency would have to conduct all consultations, formal and informal, in the context of the status of the species, the environmental baseline, and cumulative effects. See 50 C.F.R. §402.13(a). This argument is a red herring properly rejected by the district court. Fed. ER 348-349. "Informal consultation" is "an optional process ... designed to assist the Federal agency in determining whether formal consultation ... is required." 50 C.F.R. §402.13(a); see also 50 C.F.R. §§402.14(a), (b). Only where NMFS explicitly determines that the action is "*not likely to adversely affect* listed species" may the agency employ the procedures of informal consultation. 50 C.F.R. §402.13(a)(emphasis added). Formal consultation, by contrast, is for actions that may *adversely* affect a species. See 50 C.F.R. §§402.14(a), (b)(1); see also 50 C.F.R. §402.14(i) (NMFS may permit incidental take only if it determines through formal consultation that such take will not jeopardize species). Nothing in NWF's arguments conflates formal and informal consultation or renders the latter unworkable. For these same reasons, any argument that NWF's position would prevent an agency from taking beneficial actions without formal consultation is pure exaggeration. If, through informal consultation the agencies find that an action is entirely beneficial–without any adverse effects or the possibility of take–the action would be found "not likely to adversely affect" the species and would move forward through informal consultation.

must be addressed when the agency adds the effects of the proposed action to this baseline to determine whether the *proposed action* will jeopardize the continued existence of the species. The point is that a determination about whether the new proposed action will or will not cause jeopardy requires NMFS to evaluate the impacts of that action together with (i.e., added to) the impacts of the specific factors enumerated in the regulations, even though the jeopardy determination itself is made only for the proposed action.[11]

Moreover, as the district court noted, other courts have already rejected the kind of truncated, comparative jeopardy analysis that NMFS offers in the 2004 BiOp. Fed. ER 350-352(citing Kandra v. United States, 145 F. Supp.2d 1192, 1208 (D. Or. 2001) (holding that "[t]he environmental baseline is part of the entire 'effects of the action' ... that must be considered" not something "to which other conditions are compared") (emphasis added)); see also Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121, 126 (D.D.C. 2001) ("applicable regulations require

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[11] Any argument that NMFS' jeopardy analysis actually goes beyond a limited "no net effects" finding for the proposed action in isolation (set forth in Chapter 6 of the 2004 BiOp) and somehow considers the status of the species, environmental baseline, and cumulative effects cannot withstand scrutiny. The no net effects findings parallel the no-jeopardy findings (in Chapter 8 of the 2004 BiOp) and are indistinguishable from each other. Compare, e.g., Fed. ER 814, 822 (no net effects finding for Snake River fall chinook) with id. at 909 (no jeopardy finding for this species). NMFS also plainly states that any discussion of the environmental baseline and cumulative effects in chapter 8 adds no new analysis beyond the net effects determination of chapter 6. See ER at 903.

an agency to analyze the effects of its activities when added to the past and present impacts of all federal activities in the action area") (emphasis added). Indeed, NMFS' new comparative approach to evaluating jeopardy and the comparison of relative effects it produces, has already been rejected by this Court. See ALCOA v. BPA, 175 F.3d 1156, 1162 & n.6 (9th Cir. 1999) (specifically rejecting the argument that NMFS' jeopardy analysis in an earlier biological opinion for these same dams should have been limited to determining whether the proposed action would have an incremental negative effect as compared to baseline conditions).[12] There is no legal error in the district court's summary judgment ruling on this point.

2. NMFS has improperly limited the scope of consultation in the 2004 BiOp.

An essential component of NMFS' narrow, comparative assessment in the 2004 BiOp is its equally new limitation of the agency action for consultation. Based on its interpretation of another ESA regulation, 50 C.F.R. §402.03, NMFS asserts first that the agency action for consultation is limited to only those aspects of on-going FCRPS operations that lie within the action agencies' "discretionary

[12] Similarly, selected language from San Francisco Baykeeper v. U.S. Army Corps of Engineers, 219 F. Supp.2d 1001, 1023 (N.D. Cal. 2002), and Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1217 (D. Id. 1993), cannot help appellants. Whether phrased as "with reference to" or "given" the environmental baseline, the jeopardy analysis required by the regulations directs NMFS to *add* the effects of the action to the environmental baseline, not compare them.

authority," Fed. ER 602, and second, that an unspecified majority of on-going FCRPS operations and effects do not meet this criterion, id. at 648. Because NMFS cannot determine the actual limits of the agencies' discretion, it resorts to the formulation of a hypothetical "reference operation" as a surrogate "point of reference for measuring effects of the proposed hydro operation, i.e., the difference between the two operations represents the effects caused by the Action Agencies' exercise of discretion to achieve all authorized project purposes," id. at 648-649. Although NMFS asserts that this "reference operation" is designed to "maximize fish benefits," and thereby attribute more negative effects to the proposed action than it allegedly will have, id. at 649, both the reference operation and these characterizations of it have met with considerable skepticism from other fish and wildlife agencies and experts.[13]

The plain language of §7(a)(2) requires consultation on "*any* action authorized, funded, or carried out" by a federal agency. 16 U.S.C. §1536(a)(2) (emphasis added). Consequently, the regulations define agency action as "*all* activities or programs of *any kind* authorized, funded, or carried out, in whole or in part," by a federal agency. 50 C.F.R. §402.02 (emphasis added); see also Pacific

[13] Criticism of NMFS' "reference operation" and the claim that it "maximizes fish benefits" has been extensive and includes comments from, among others, the Oregon Dept. of Fish & Wildlife, ER:732 at 463, 465-469, and the Columbia River Treaty Tribes, ER:731 at 391-400.

Rivers Council v. Thomas, 30 F.3d 1050, 1054-1055 (9th Cir. 1994). Nonetheless, appellants argue that this broad and unequivocal description of the scope of federal action is illusory because a single word in a separate regulation–the word "discretionary" in 50 C.F.R. §402.03–undoes what the statute and regulations otherwise so clearly require. This view is untenable as a matter of law and leads to the convoluted agency gymnastics in the 2004 BiOp as a matter of fact. The district court carefully and correctly explained both why this interpretation of the regulation conflicts with the ESA and why it is not supported by the regulation itself. Fed. ER 339-347& n.6 (citing regulatory history and finding "that as long as some Federal discretionary or involvement or control remained that could avoid jeopardizing the listed species ... the degree of completion of a project was irrelevant.") (citing 43 Fed. Reg. 872 (1978)).[14]

[14] One need look no further than NMFS' tortured attempt to designate a "reference operation" that would capture the purportedly discretionary limits of on-going FCRPS operations to understand that NMFS' attempt to extend 50 C.F.R. §402.03 leads to absurd results. First, NMFS admits that "it is beyond NOAA Fisheries and the Action Agencies' technical ability" to actually distinguish between the effects of discretionary and non-discretionary FCRPS operations. Fed. ER 648. NMFS then includes in the reference operation a mix of allegedly discretionary and non-discretionary operations but asserts that the agencies would "lack the authority to implement it." Id. at 649. In the end, the reference operation that NMFS invented as a way to demarcate the limits of the agencies' discretion cannot even achieve its purpose.

i. Appellants have not identified a single clear statutory limitation on their discretion in any event.

Notably, for all of their arguments for a manufactured distinction between discretionary and nondiscretionary actions, appellants have never addressed the district court's detailed analysis of the statutes that govern FCRPS operations and its finding that, whatever the meaning of 50 C.F.R. §402.03, "Congress has provided the agencies with statutory authority and discretion to act for the benefit of listed species in operating the DAMS." Fed. ER 341, 344 (agency has "considerable discretion" to operate FCRPS and protect ESA-listed salmon). Indeed, Congress has never explicitly constrained the discretion that the action agencies have to operate the FCRPS in ways that would prevent taking steps to benefit fish but instead has specifically granted the agencies discretion to protect fish. For example, in the Northwest Power Act, 16 U.S.C. §839 et seq., Congress provided a clear and "affirmative conservation mandate" for the agencies to protect fish and wildlife, specifically including salmon. Fed. ER 342; see also NRIC v. Power Planning Council, 35 F.3d at 1388 (Act passed to put fish and wildlife "on par with energy"); Fed. ER 344 (finding "fish and wildlife protection" among congressionally authorized purposes for each dam). Appellants' continued failure to address this threshold flaw in their "discretionary action" limitation is fatal to their argument.

ii. Appellants' interpretation of §402.03 conflicts with the structure of the ESA.

Similarly, appellants' interpretation of 50 C.F.R. §402.03 as an inflexible sorting requirement to exclude *all* non-discretionary features of an action from any consideration in consultation creates irreconcilable structural conflicts. The ESA and its regulations very plainly require that if there is any discretionary involvement in the action that warrants initiation of consultation, further distinctions/questions about the extent of the agency's discretion are relevant only when deciding whether an action that causes jeopardy can be modified or mitigated to avoid jeopardy. Fed. ER 345. Thus, under the regulations, if NMFS finds that an action will jeopardize a listed species, it must propose a reasonable and prudent alternative ("RPA") that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. §402.02.

If there is no RPA for an action (e.g., because there is no alternative within the current authority of the federal agency that it could take to avoid jeopardy), NMFS must issue a "jeopardy" biological opinion that effectively prohibits the agency from taking the proposed action. The action agency's only recourse at that point is to accept the opinion and cease the activity or to apply to the Endangered Species Committee for an exemption from §7. 16 U.S.C. §1536(g); 50 C.F.R. §402.15(b). In enacting these provisions, Congress clearly grappled with questions about the scope of an agency's discretion and authority, and chose not to limit §7

consultation to only discretionary actions.[15] If consultation could never address anything but discretionary agency action as NMFS argues, none of these §7 procedures for addressing a conflict between the limits of an agency's existing authority and the ESA would be necessary. Of course, those sections of the statute cannot be interpreted to be superfluous.[16] Fed. ER 345.

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[15] Among other things, the unique statutory exemption process discussed above distinguishes this case from National Wildlife Fed'n v. Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004). While NWF v. USACE may stand for the proposition that the Corps cannot exercise authority it does not have under the *Clean Water Act*, that proposition does not limit the scope of *ESA* consultation to the discretionary pieces of a federal action where the entire action must comply with the ESA. See 16 U.S.C. §1536(a)(2)(*any* federal action must avoid jeopardy). Nor does such a comprehensive consultation on on-going FCRPS operations require appellants to have unlimited authority to remove dams as appellants have claimed. Instead, if the effects of an action, including both its discretionary and non-discretionary components, cannot be altered within the scope of the agency's existing authority to avoid jeopardy, the ESA requires a jeopardy biological opinion for the entire action and allows resort to the ESA exemption process.

[16] The fact that an agency may seek an exemption if NMFS determines that a wholly discretionary action will jeopardize the continued existence of a species is irrelevant. In enacting this provision of the ESA, Congress anticipated conflicts between the limits of an agency's authority and preservation of listed species, not just an agency's desire to push through a discretionary project. See 16 U.S.C. §§1532(1) (defining the term "alternative courses of action" to include "all alternatives", even actions outside agency's jurisdiction); 1536(h)(1)(A)(ii) (describing scope of committee authority). If consultation (and hence the committee) could never address anything but discretionary agency action, procedures for addressing a conflict between the limits of an agency's existing authority and the ESA would be unnecessary. See H.R. REP. NO. 95-1625, at 51 (1978) *reprinted in* 1978 U.S.C.C.A.N. 9453, 9463 (1978 WL 8486, *13) (exemption process intended for "those cases where a federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of section 7"); see also id. at 62, 1978 WL 8486 at *22.

iii. Appellants misinterpret the case law.

The district court properly determined that the "the plain language of §402.03 does not eliminate consultation in situations where there is some meaningful discretionary involvement or control." Fed ER at 339; see also id. at 340-341 (citing and analyzing cases). Appellants mischaracterize the holdings of several cases in an attempt to argue that agency action can be cleanly divided into discretionary actions that require consultation and non-discretionary ones that do not. None of these cases can be coaxed into supporting appellants' novel narrowing of agency action. Instead, the test applied in each of the cases addressing 50 C.F.R. §402.03 is whether the agency retained *any* discretion and, if so, they hold that consultation is required. See, e.g., Washington Toxics Coalition, No. 04-35138, slip op. at 7739 (consultation required where agency had "discretion to alter registration of pesticides for reasons that include environmental concerns"); NRDC v. Houston, 146 F.3d 118, 1126 (9th Cir. 1998) (consultation required where agency had "some discretion" to consider and act for the benefit of listed species when negotiating water delivery contracts); Sierra Club v. Babbitt, 65 F.3d 1502, 1508, 1511-12 (9th Cir. 1995) (no consultation required where agency had issued permit before enactment of ESA and had no authority to reopen or modify permit and hence there was no longer any agency action at all). It is noteworthy that there is not a single case where a court has upheld NMFS' decision, once consultation

has been triggered and initiated, to parse the action for consultation into its constituent discretionary elements that it will consider and non-discretionary elements that it will not.[17] Sierra Club and its progeny merely examined and rejected a claim that the agency lacked sufficient discretion over an action to even initiate consultation.

The district court correctly applied the law and held that "NOAA must consult on the entire proposed action if the action agencies have meaningful discretion to operate DAMS in a manner that complies with the ESA." Fed. ER 341.

3. NMFS' critical habitat determinations are contrary to law, arbitrary, and capricious.

In Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004) ("GP Task Force"), this Court held that NMFS must examine the impacts of an action on a species' likelihood of recovery, as well as its survival, in determining whether the action will adversely modify critical habitat. In the 2004 BiOp, NMFS concluded that the existing state of critical habitat in the

[17] Ground Zero Center for Non-Violent Action v. U.S. Dept. of the Navy, 383 F.3d 1082 (9th Cir. 2004), is not to the contrary. In that case, the Navy apparently did not address the initial presidential decision to site the Trident II missile backfit program at the Bangor sub base when it informally consulted with NMFS. The reason for this limitation is simple: the President's actions (in choosing where to cite the program) are not subject to the ESA at all. See id. at 1092; see also 16 U.S.C. §§1536(a)(2); 1532(7) (term "federal agency" does not include President).

Snake River was poor and would worsen in the near-term under the agencies' proposed action. Fed. ER 909-910, 915, 938. Despite this increased degradation, NMFS found that the action would not adversely modify critical habitat because the agency expected measures it would take in the future to eventually improve habitat conditions. Fed. ER 807-808, 836. The district court determined that this conclusion was contrary to the ESA and GP Task Force because NMFS' "optimism that the long-term improvements in critical habitat will offset the degradation of the habitat necessary for survival or recovery in the first five years of the 2004 BiOp is unrealistic." Fed. ER 355-356 (citing PCFFA v. NMFS, 265 F.3d 1028, 1037-38 (9th Cir. 2001)).[18]

Appellants cannot carry their burden to demonstrate a likelihood of success on the merits in light of the district court's correct and unchallenged enumeration of at least four bases for this ruling. See Fed. ER 356 (noting that in its critical habitat analysis NMFS "does not analyze the significant degradation in the already poor condition of critical habitat[] in the context of the life cycles and migration patterns [of the listed species]," that the action agencies "have not committed to

[18] There was uncontradicted evidence before the district court that reduced spill under the proposed action was one of the factors that led NMFS to find degradation of critical habitat, Fed. ER 354 (noting that reduced spill in the proposed action impairs critical habitat in the short-term), an injury that would be alleviated by increased spill, see e.g., Fed. ER 915 ("In this case, the reduction in safe passage is due, in large part, to the operation that does not make maximum use of spillways, the safest route of in-river passage."); see also id. at 914, 835.

install [the dam modifications] that NOAA relies on to offset the short-term reduction in critical habitat," that "NOAA is at best 'uncertain' as to whether the short-term degradation of critical habitat will be offset by long-term habitat improvements," and that in any event NOAA "does not know '[t]he in-river survival rate necessary for recovery.'") (citations omitted)).

4. NMFS' jeopardy analysis failed to address the effects of the action on species recovery.

Finally, the district court properly determined that, apart from its erroneous evaluation of critical habitat, NMFS' jeopardy analysis also failed to address the impacts of the action on the likelihood of recovery of the species as the regulations require. Fed. ER 357-358. The lower court's ruling is grounded squarely in the plain language of the ESA regulations which state that an action may jeopardize a species if it appreciably reduces "the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. §402.02.[19]

As a threshold matter, the district court appropriately recognized that the regulations and Consultation Handbook require NMFS to make a determination about the impact of the action on the likelihood of a species survival *and* recovery in order to determine whether an action will cause jeopardy. Fed. ER 357-358 (citing 50 C.F.R. §402.02 and Consultation Handbook at 4-35 (ER:713 at 321)).

[19] NWF also adopts plaintiff-intervenor-appellee's State of Oregon's arguments on this issue.

The court found that "the likelihood that recovery and survival will occur is reduced when the likelihood of either is reduced." Fed. ER 358. This conclusion is well-supported. In a 1999 guidance document called the "Habitat Approach," which NMFS cites in the 2004 BiOp, Fed. ER 600, NMFS states that because "impeding a species' progress toward recovery exposes it to additional risk, and so reduces its likelihood of survival ... in order for an action to not 'appreciably reduce' the likelihood of survival, it must not prevent or appreciably delay recovery." ER:695 at 239.[20] Moreover, as the district court found, in the 2000 BiOp NMFS explicitly included effects on recovery as one prong of its jeopardy analysis. ER:704 at 246 (2000 BiOp). Neither this recovery standard nor any other plays a part in the 2004 BiOp's no-jeopardy finding. The district court correctly ruled that appellants had violated the requirement to consider recovery in conducting a jeopardy analysis.

II. AN INJUNCTION IS NECESSARY TO LIMIT THE HARM TO SNAKE RIVER FALL CHINOOK

The district court issued a tailored injunction to help protect migrating juvenile Snake River fall chinook from harm they would otherwise face this

[20] The preamble to the ESA regulations makes a similar point, noting that "significant impairment of recovery efforts or other adverse effects which rise to the level of 'jeopardizing' the 'continued existence' of a listed species can also be the basis for issuing a 'jeopardy' opinion." 51 Fed. Reg. 19926, 19934 (June 3, 1986).

summer from operations permitted under the unlawful 2004 BiOp. This relief is well-grounded in both the law and the facts.

A. The ESA Injunction Standard Applies to This Case.

This Court has held consistently that "[g]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction...." Thomas, 753 F.2d at 764; Washington Toxics Coalition, No. 04-35138, slip op. at 7742-7743. Indeed, the presence of the listed species together with a failure to comply with the ESA's procedural requirements is sufficient to support an injunction even without proof that the action likely will harm a listed species. Id. at 763; Greenpeace v. NMFS, 106 F. Supp.2d 1066, 1073-1078 (W.D. Wash. 2000). Where, as here, an agency has not completed the consultation process successfully, knowledge about the effects of the action on listed species and critical habitat is necessarily incomplete and the risk of uncertainty is borne by the species, a result that is "impermissible." Thomas, 753 F.2d at 764. For this reason, even the "possibility" of harm to a listed species is sufficient to support an injunction. Earth Island Inst. v. Forest Serv., 351 F. 3d 1291, 1298 (9th Cir. 2003).

In light of this highly protective standard, courts in this Circuit have regularly granted injunctive relief against all or part of an agency action, including on-going actions, in order to reduce or eliminate the risk of harm to a listed species. See, e.g., ER:602 at 136-139 (2004 Spill Injunction); see also Pacific

River Council v. Thomas, 30 F. 3d 1050, 1057 (9th Cir. 1994) (enjoining "ongoing and announced timber, range, and road projects"); Greenpeace Found. v. Mineta, 122 F. Supp.2d 1123, 1139 (D. Haw. 2000) (enjoining on-going fishing); Greenpeace, 106 F. Supp.2d at 1080 (same); Pacific Coast Federation of Fishemens' Associations v. Bureau of Reclamation, 138 F. Supp.2d 1228, 1247-1250 (N.D. Cal. 2001) (limiting water deliveries from federal water project in absence of adequate opinion in order to provide stream flows for ESA-listed salmon).

The fact that the district court could not simply halt operation of the FCRPS dams and reservoirs pending compliance with the ESA does not alter the fundamental legal analysis or the standards for granting an injunction. Rather these circumstances required the district court to consider tailored relief that would protect the listed species to the extent possible in light of the available evidence. See PCFFA v. BOR, 138 F. Supp.2d at 1249-50. The argument that such relief is necessarily mandatory in nature and hence must meet a different standard than the one this Court has adopted for violations of the ESA is untenable. Such a standard would arbitrarily subject ESA-listed species that happen to be harmed by an on-going federal action that cannot be halted (even though it can be modified to reduce the risk of harm) to an increased risk of injury without any basis in the

statute or case law for such a result.[21] Moreover, contrary to the appellants' arguments, there is no material difference between "mandatory" and "prohibitory" injunctions in any event. See United States v. Western Elec. Co., 46 F.3d 1198, 1206 (D.C. Cir. 1995) ("[e]xperience has shown that the dichotomy [between mandatory and prohibitory injunctions] is an illusion and cannot be maintained. ... The mandatory injunction has not yet been devised that could not be stated in prohibitory terms.").

Appellants' arguments also ignore the broad power that courts retain to enforce and give meaning to their orders. For example, in Washington Toxics Coalition, No. 04-35138, slip op. at 7743, this Court upheld a district court's injunction requiring EPA to "develop and distribute point-of-sale notifications detailing pesticide harm to salmonids." The Court determined that the injunction–which unquestionably required EPA to take affirmative action–"was well within the district court's discretion to require compliance with the ESA and to tailor a

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[21] Under these circumstances, asserting that the only appropriate relief is maintaining the operational status quo is tantamount to asserting that illegal agency action must be allowed to continue unchanged while the agency complies with law. The law is not so blind, nor the power of the court so limited as to require this result. In the ESA context, the status quo is protecting endangered species from threats even from ongoing activities; it is not protecting the on-going activity. See Washington Toxics Coalition, No. 04-35138, slip op. at 7742 (upholding district court's grant of injunctive relief that, among other things, required EPA to take affirmative steps because "it is the very maintenance of the 'status quo' that is alleged to be harming the endangered species."); Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 745 (D. Id. 1996).

remedy pursuant to Federal Rule of Civil Procedure 65." Id., slip op. at 7743-7744.[22]

Nor can appellants successfully distinguish this case from Thomas and its progeny or the standards for an injunction established in those cases. First, this Court's decision in NWF v. Burlington Northern, 23 F.3d 1508 (9th Cir. 1994), is inapplicable because it identifies the standard for an injunction where a court finds an underlying violation of ESA §9, 16 U.S.C. §1538, is likely. In Thomas, the Court rejected the notion that a party asserting a §7 violation "has the burden of showing the proposed action would have some prohibited effect on an endangered species or its critical habitat" as a "misapplication" of the standard for §9 "take" violations to the §7 consultation process. 753 F.2d at 765; see also Greenpeace, 106 F. Supp.2d at 1073 (same).[23] The district court determined that it did not need to address NWF's § 9 claims. Fed. ER 338.

Second, Thomas and its progeny do not require a court to reflexively grant plaintiffs any injunction they may seek, nor has NWF argued otherwise. Rather,

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[22] This is not a case like Fallini v. Hodel, 783 F.2d 1343, 1345-46 (9th Cir. 1986), where the lower court's injunction lies outside the agencies' current authority or discretion. The statutes governing operation of the FCRPS provide ample discretion to implement the injunction. See Fed. ER 342-45.

[23] Regardless, as discussed infra at 43-47, NWF has satisfied the "reasonably certain threat of imminent harm" test established by these §9 cases. Burlington Northern, 23 F.3d at 1510-11.

the Thomas line of cases makes it clear that: (1) Congress has balanced the equities in favor of injunctive relief where there is a violation of the ESA, Marbled Murrelet v. Babbit, 83 F.3d 1068, 1073 (9th Cir. 1996); (2) where federal agencies have failed to comply with the consultation requirements of §7, there can be no assurance that the very risk to the species the statute was intended to prevent will not occur, Thomas, 753 F.2d at 764, and; (3) where agencies have failed to comply with the §7 procedures, a district court must review and weigh the evidence to determine how best to protect the species while the agencies comply with the law, Washington Toxics Coalition, No. 04-35138, slip op. at 7742-7743, Greenpeace, 106 F. Supp.2d at 1080 (enjoining on-going fishing only in sea lion critical habitat to protect species during reconsultation); see also PCFFA v. BOR, 138 F. Supp.2d at 1048-50 (weighing evidence to determine scope of injunction). It is this last step that is properly the focus of the district court injunction in this case.

B. The District Court's Findings of Irreparable Harm and of the Need for a Limited Injunction Are Not Clearly Erroneous.

Because the district court applied the correct legal standard to NWF's injunction request, the only remaining question is whether the court's conclusions that the proposed federal action would harm ESA-listed salmon and that the limited relief it granted would reduce that harm are clearly erroneous. Rodde, 357

F.3d at 994-95. Both conclusions are amply supported by the evidence.[24]

1. On-going FCRPS operations cause substantial and irreparable harm to juvenile Snake River fall chinook salmon

The district court found that the proposed action for which the federal agencies had failed to comply with the requirements of §7–on-going operation of FCRPS dams and reservoirs–"contribute to the endangerment of the listed species and irreparable injury will result if changes are not made." Fed. ER 567-68. The court went on to find that "[a]mple evidence in the record ... indicates that operation of the DAMS causes a substantial level of mortality to migrating juvenile salmon and steelhead," id., and that "'the existence and operations of the dams and reservoirs ... account[s] for most of the mortality of juvenile migration through the

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[24] A district court decision to grant or deny an injunction, under the ESA or otherwise, is fundamentally different from APA review of whether final agency action is arbitrary or contrary to law. In considering injunctive relief, the district court is sitting in equity, weighing the facts and evidence to determine whether an injunction should issue. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-312 (1982) ("the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims" of injury) (citations omitted); see also Dade v. Irwin, 43 U.S. 383, 391 (1842) ("in cases of this sort [involving equitable relief], in the examination and weighing of matters of fact, a court of equity performs the like functions as a jury"). For this reason, the parties may submit evidence regarding harm and the need for relief–as they did here–and are not limited to the administrative record. See, e.g., Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). Likewise, in evaluating a request for an injunction where a plaintiff has either established success on the merits or shown a likelihood of success, federal agencies do not receive the deference on factual matters that they enjoy in review of final agency action "on the record" under the APA. See PCFFA v. BOR, 138 F. Supp.2d at 1048-50 (evaluating and weighing evidence in issuing injunction).

FCRPS ...,'" id. (quoting 2004 BiOp, Fed. ER 672).

These findings of harm from the proposed federal action could not enjoy more extensive evidentiary support.[25] First, the 2004 BiOp itself confirms that FCRPS operations will kill or injure between 80% and 90% of the juvenile Snake River fall chinook that migrate downstream through the dams and reservoirs this summer. Fed. ER 948 (Table 10.3) (identifying "total FCRPS passage mortality").

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[25] Appellants have expended considerable effort arguing that the district court did not make enough findings with the requisite detail to support its injunction. Their true complaint is not with a lack of findings but with the result. Regardless of the length of the decision, appellants would still have disagreed with the result and appealed. More to the point, this Court has consistently refused to adopt a formulaic approach to the nature and extent of findings necessary to support an injunction. See GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000) (affirming lower court order where the Court was "capable of finding support for the district court's ruling in the record" even though the order was "terse") (citing and quoting Unt v. Aerospace Corp., 765 F.2d 1440, 1444 (9th Cir. 1985) (affirming decision where "the basis for the court's decision is clear [and] the record gives substantial and unequivocal support for the ultimate conclusion")); see also Idaho Watershed Project v. Hahn, 307 F.3d 815, 834, & n.8 (9th Cir. 2002) (holding that findings made in summary judgment ruling and in injunction ruling are both properly considered and were "'sufficiently specific to permit fair appellate review'"). The Court's decision in FTC v. Enforma, Inc., 362 F.3d 1204, 1216 (9th Cir. 2004), is not to the contrary. There the Court simply noted that any findings "must be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision," id., a standard the district court's injunction order in this case easily meets for the reasons discussed in text. Nor does Fed. R. Civ. P. 52 alter the standards this Court employs. Rule 52 simply does not require elaborate written findings or a response by the lower court to every argument or piece of evidence. Century Marine v. U.S., 153 F.3d 225, 231 (9th Cir. 1998). Indeed, the district court is *presumed* to have considered all evidence, and Rule 52 is satisfied if the court's orders "give the reviewing court a clear understanding of the basis for the decision." Century Marine, 153 F.3d at 231.

Moreover, this exceptional level of injury would occur even *with* the collection and barging of as many juvenile salmon as possible under the proposed action. Id. (projected take for the proposed action which *includes* maximum summer transportation and no spill at collector projects). Even the federal agencies' contrived and improper effort to limit their accountability for juvenile salmon mortality to so-called "discretionary" operations shows that this subset of on-going operations will kill or injure 1% to 4% of all Snake River fall chinook juveniles. Fed. ER 946 (Table 10.1). As the district court found, there can be no legitimate doubt that on-going operation of the FCRPS will harm juvenile fall chinook. Fed. ER 567-69 (Injunction Order); see also ER:910 at 615-616 (NOAA Technical Memorandum) ("Summer migrants suffer greater mortality in reservoirs than do spring migrants ... and generally lower survival of summer migrants likely resulted from conditions in the reservoirs, potentially low flow, and possibly a lack of spill."). This acknowledged harm cannot be dismissed as somehow *de minimis* under the ESA. See Earth Island, 351 F.3d at 1298; National Wildlife Federation v. NMFS, 235 F. Supp.2d 1143, 1161 (W.D. Wash. 2002).[26]

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[26] Nor can federal appellants credibly claim that measures to better protect juvenile fall chinook from harm are unnecessary because current dam operations are adequate to avoid harm. The district court has correctly concluded that Snake River fall chinook populations are still at serious risk of extinction, Fed. ER 331, 369-77, that the claim of recent improved returns lacks credible scientific support, ER:602 at 137-38 (2004 Spill Injunction); see also ER:732 at 471 (Oregon Fish and Wildlife comments noting that "[m]any populations appear to have peaked in

Appellants' misguided efforts to argue that Snake River fall chinook populations are somehow rebounding under the proposed agency action also cannot obscure the extraordinary injury to the species from FCRPS operations. See, e.g., ER:839 at 564-569 (Olney Declaration) (explaining harm to fish under 2004 BiOp summer operations).[27] As the district court carefully and correctly explained in its summary judgment ruling, the basis for the view that fall chinook populations are rebounding is a single study that is contrary to other available evidence and employs a type of analysis that the court has previously rejected as arbitrary. See supra at 11, & n.4. As the court also noted, other agency analyses of whether fall chinook populations are rebounding are much more pessimistic. Fed. ER 330-32, 369-77 (summarizing agency's most recent comprehensive assessment of Snake River fall chinook which concludes that even with recent returns, they are

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2001 or 2002 and have since declined"), that NMFS' own analysis shows fall chinook juvenile survival is not meeting agency performance standards, ER:550 at 45-45a, and that the species is in a "deficit situation" where measures to improve survival and reduce harm are urgently needed, Fed ER 567; ER:602 at 136-39.

[27] Appellants have advanced a specious argument that because increased salmon returns occurred during a period when the Corps was transporting salmon, there is support for the strategy to continue transportation. See, e.g., Fed. ER 659. This argument assumes cause and effect where none exists. As Oregon Department of Fish and Wildlife highlighted, "the proportion of Snake River fall Chinook transported (95%) has been consistent since 1995, well before recent returns [and] the recent increases in abundance are consistent with coast-wide abundance increases of other species, including those not affected by transportation." ER:732 at 471.

"likely to become endangered"). Further, as the court found a year ago in its 2004 injunction ruling, "NOAA Fisheries has itself documented that the RPA [from the 2000 BiOp] has not been implemented as planned and the predicted survival improvements for Snake River fall Chinook juveniles have not materialized." ER:602 at 137-38. This conclusion remains as valid and well-supported today as it was a year ago. ER:836 at 531-21 (Pettit Declaration); ER:839 at 564-69 (Olney Declaration); ER:975 at 725-28 (Second Olney Declaration). The district court's finding of irreparable harm from the proposed federal action for which there has been no legally adequate compliance with the ESA is not clearly erroneous.[28]

2. *The district court's limited injunction will reduce the harm to juvenile Snake River fall chinook.*

The district court granted only one aspect of NWF's request for an injunction to protect juvenile fall chinook this summer–increased spill at four dams where it would not otherwise occur. Fed. ER 567-70. Like its finding of irreparable harm from the proposed federal action, the grant of this limited relief is

[28] Appellants' argument that the injunction must somehow be directed at curing the flaws in the jeopardy analysis in the 2004 BiOp is curious at best. First, curing these flaws is the agencies' job on remand. The court's role is to ensure that the listed species are protected from harm to the extent possible while the agencies do so, Washington Toxics, No. 04-35138, slip op. at 7741, which is precisely the focus of the injunction in this case. Second, if an injunction could only address directly the agency legal violation, a court could never enjoin any action pending compliance with the law. The only remedy would be a remand to the agency to correct the problem while the action proceeds and the species suffers.

amply supported by the available evidence and is not clearly erroneous. NWF has already explained the compelling evidentiary basis for allowing additional summer spill to improve juvenile fall chinook survival and reduce the harm to these fish. See supra at 2-6. The district court correctly concluded that "the proposed action analyzed in the 2004 BiOp allows for no voluntary spill at four lower Snake River and Columbia Dams" and that "[t]his restriction would not preserve even a semblance of the spread-the-risk considerations NOAA contends govern the spring migration program." Fed. ER 568. Based on these findings, the court also correctly concluded that in the absence of an injunction to allow additional spill, "irreparable harm [will] result[] to listed species as a result of the action agencies' implementation of the updated proposed action." Id. It is precisely the appellants' failure to provide voluntary spill in the summer at all eight FCRPS dams, as it does in the spring in order to improve juvenile salmon survival, that has been the consistent focus of federal, state, and tribal fishery scientists' recommendations. See supra at 2-6 (citing these recommendations and analyses). The district court's decision to enjoin the Corps to allow these additional protective measures this summer does not lack for evidentiary support and is not clearly erroneous.[29]

[29] The district court was not confused as appellants have claimed. The court correctly pointed out that since at least the 2000 BiOp, the federal agencies have promised to provide additional summer spill to, among other things, "allow for a meaningful in-river migration program against which the summer transportation program would be compared." Fed. ER 568. This increased summer spill,

Nor are Appellants' remarkable claims of harm from increased spill itself supported by the evidence before the district court. First, spill already occurs in the summer at four of the eight Snake and Columbia River dams and provides significant survival benefits. Fed. ER 1012. It also occurs in the spring at all eight dams to benefit spring migrants. Id. at 1007. Increased spill this summer at the four so-called "collector" projects under the injunction will lead to a reduction in capture and barging of juvenile salmon and a corresponding increase in migration of these fish in the river.[30] This change will provide a benefit–not a detriment–to their survival.[31] See ER:569 at 62 ("eliminating transportation of fall chinook and

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however, has never materialized despite repeated requests for it from other federal, state, and tribal fish managers. See, e.g., ER:839 at 554-58, 570-71 (Olney Declaration); ER:975 at 721-25 (Second Olney Declaration).

[30] Appellants' claims that additional spill will cause other problems for juvenile fall chinook are likewise insubstantial. As NWF explained to the district court, (1) high levels of dissolved gas are unlikely to develop this summer even with additional spill, and (2) NWF did not seek summer spill that would increase dissolved gas to harmful levels. See, e.g., ER:836 at 535-36 (Pettit Dec.); see also ER:972 at 676-80 (Lorz Dec.). The implication that the district court's injunction will nonetheless requires the Corps to violate Clean Water Act standards because it will lead to high dissolved gas levels is simply false. Intervenors' claims that the injunction will force more juvenile salmon to migrate in hot water are similarly unpersuasive. Temperatures in the Snake River in the summer are not ideal for salmon under any circumstances. Even so, as noted above, fish that migrate in the river even with these poor conditions return as adults at rates equal to or better than fish that are transported. Increased spill will improve river conditions by moving more fish past the dams quicker and with higher survival. See supra at 2-6, 45 & n.26 (citing and quoting evidence).

[31] Ironically, NMFS argues inconsistently both for allowing for more juvenile fish

implementing a spring like spill program in summer months could provide significant increases of listed Snake River fall chinook"); ER:863 at 532-40 (Petit Declaration); ER:839 at 570-73 (Olney Declaration); ER:975 at 721-725 (Second Olney Declaration); see also ER:552 at 49(joint technical comments of fishery managers concluding that "recent analysis of smolt-to-adult return rates indicates that a spread-the-risk policy allowing fish to migrate in-river as well as [be] transported, such as [is] in place for spring chinook, may be the most appropriate management approach"); Fed. ER 317 (NMFS analysis showing even in 2001 when in-river conditions were the worst on record for summer migrants, fall chinook juveniles that were returned to the river to migrate (rather than transported) had a higher smolt-to-adult return ratio (.45) than fish that were transported (.23 and .33 depending on the dam where they were collected for transport).[32]

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to remain in the river and even touts these in-river fish as critical to the future of the species, Fed. ER 309-10 (noting that some of the Snake River fall chinook juveniles that are allowed to migrate in the river even under current conditions "holdover" and return as adults at much higher rates than any other group of juveniles), and yet also argues that in-river conditions are so bad all juveniles should be captured and transported. Id. at 306-308. Of course, maximizing transportation as NMFS urges effectively limits the ability of juvenile fall chinook to hold over and eliminates the potential for more of these fish to holdover and return at higher rates as adults. See Fed. ER 318 ("it is not obvious that hastening subyearlings downstream is beneficial").

[32] Appellants have cited the lower river flows expected this summer as justification for avoiding any additional spill or in-river migration of juvenile salmon. The

In sum, both the district court's findings of irreparable harm from the proposed federal action and its decision to enjoin the Corps to allow additional spill this summer at four dams on the Snake and Columbia rivers to reduce the risk of harm to ESA-listed Snake River fall chinook are well-supported and are not clearly erroneous.

3. The public interest supports the district court injunction.

Once the district court found a violation of the ESA and a risk of harm to a listed species that could be alleviated, the ESA required the court to issue an injunction to reduce that risk. Appellants attempt to inject economic factors into this clear requirement by arguing that the district court did not give enough weight to the public interest in generating additional electricity and income for BPA. This argument is wrong on at least two fronts.

First, the ESA simply does not provide for such considerations when dealing

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record evidence does not support this view. First, state and tribal fish managers have requested summer spill to benefit fish despite low summer flows because the scientific evidence supports this measure. See, e.g., ER:975 at 724-25; ER:732 at 468. Second, NMFS own model indicates that salmon survival would improve with summer spill even with the flows expected in 2005. See ER:972 at 665-668 (Lorz Declaration); see also Lorz Dec. at ¶¶ 8-13 (submitted by NWF in response to appellants' emergency motions). Finally, NMFS' own evidence shows that transportation (as opposed to migration in the river), even during the summer, provides no apparent benefits to juvenile fall chinook. ER:910 at 614. Of course, this analysis is based on evidence collected in summers where no spill occurred at collector projects to improve in-river passage, so that it does not actually support NMFS' claim that transportation is better for juveniles than the improved conditions available with increased spill.

with actions that will harm species threatened with extinction. Washington Toxics Coalition, slip op. at 7743; Sierra Club v. Marsh, 816 F.2d at 1386-87. (ESA dictates that any risk "must be borne by the project, not by the endangered species"). Second, the contention that the public interest in the rates BPA charges for its electricity outweighs the harm to ESA-listed Snake River fall chinook is flatly incorrect. The additional power that could be generated by water that will be spilled under the injunction will save ratepayers only pennies a month. ER:974 at 709-710 (Sheets Declaration) ("costs" of power generation foregone to protect listed species would have only modest impact on BPA's rates). In addition, there is an ample regional power supply, id. at 713-714; rates are already well below those elsewhere, id. at 712-713; and recent rate increases are the product of risky and incorrect market choices by BPA, not measures to protect ESA-listed salmon and steelhead; see ER:592 at 123-124 (2004 Sheet Declaration) (citing BPA rate analysis) (BPA has acknowledged that higher power rates resulted from its own decision to contract for more power than it could generate and extreme market pressure in 2001 to provide the additional electricity it had contracted to deliver). Other economic effects of an injunction are likely to be minor and can be effectively mitigated in any event. See ER:969 at 622-625 (Niemi Declaration).

CONCLUSION

For all of the foregoing reasons, the Court should deny these appeals and

affirm the district court's injunction order.

Respectfully submitted this 30th day of June, 2005.

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for plaintiff-appellees National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Trout Unlimited, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Idaho Rivers United, Idaho Steelhead and Salmon United, Northwest Sportfishing Industry Association, Salmon for All, Columbia Riverkeeper, American Rivers, Federation of Fly Fishers, and NW Energy Coalition, are not aware of any related cases.

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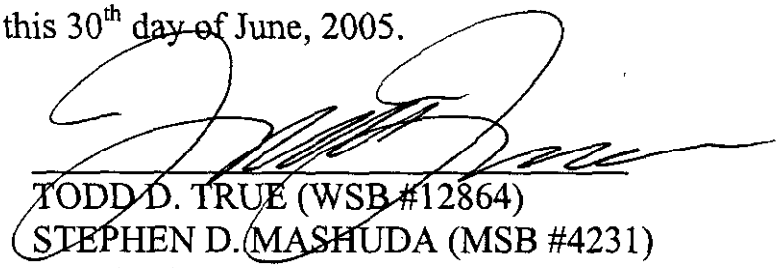

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of June, 2005, at Seattle, Washington.

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